FILE COPY

NOV 3 1934

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 120.

UNITED STATES OF AMERICA,
Petitioner,

against

GUARANTY TRUST COMPANY OF NEW YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT GUARANTY TRUST COMPANY OF NEW YORK.

JOHN W. DAVIS,
THEODORE KIENDL,
Counsel for Respondent.

THE BALLOU PRESS NEW YORK

INDEX.

	PAGE
Statement of the Case	1
Statement of Facts	2
Questions Presented	5
Statutes Involved	5
Summary of Argument	5
Argument	7
Conclusion	27
Appendix	28

Citations.

CASES:

American Hominy Co. v. Millikin National Bank, 273 Fed. 550	24
Beneficial Loan Association v. Hillery, 95 N. J. L. 271	18
Blackwell v. Farmers & Mechanics Bank, 97 Texas 445	17
Brook, Oliphant & Company v. Vannest, 58 N. J. L. 162	14
Bull v. Bank of Kasson, 123 U. S. 105	18
Central National Bank v. North River Bank, 44 Hun (N. Y.) 114	21, 25
Chapman v. Mills and Gibb, 241 Fed. 715; affirmed 250 Fed. 1018	15
Cooke v. United States, 91 U. S. 389	26
Disconto-Gesellschaft v. U. S. Steel Corp., 267 U. S. 22	14
Dousmanis v. Colonial Bank, 135 (N. Y.) Misc. 472	24
Dundas, et al., v. Bowler, et al., 8 Fed. Cas. 30, No. 4141	14

PAGE

Embiricos v. Anglo-Austrian Bank, 1 L. R. [1905], 1 K. B. 677 ..... 9, 11
Fogarty v. Neal, 201 Ky. 85 14
Geering v. Metropolitan Bank, 170 N. Y. App. Div. 751; affirmed 225 N. Y. 711 20
Hayden v. Chemical National Bank, 84 Fed. 874; affirmed 174 U. S. 610 15
Hutchison v. Ross, 262 N. Y. 381 12
Insurance Co. of North America v. Fourth National Bank, 12 Fed. (2d) 100 21
Ladd & Tilton Bank v. United States, 30 Fed. (2d) 334 26
Leather Manufacturer's Bank v. Merchants Bank, 128 U. S. 26 ..... 20, 21, 25
Lennon v. Grauer, 159 N. Y. 433 21
McClintick v. Cummins, 15 Fed. Cas. 1272, No. 8699. 14
National Bank of Commerce v. Seattle National Bank, 109 Wash. 312 24
New York Produce Exchange Bank v. Twelfth Ward Bank, 135 N. Y. App. Div., 52 25
Pullen v. Placer County Bank, 138 Cal. 169 18
Seaboard National Bank v. The Bank of America, 193 N. Y. 26 20
State ex rel. Hadley v. Greenville Bank, 187 S. W. (Mo.) 597 18
United States v. Bank of New York, 219 Fed. 648 26
United States v. National Exchange Bank, 214 U. S. 302 ..... 21, 25
United States v. National Exchange Bank, 270 U. S. 527 25
Weiand's Administrator v. State National Bank of Maysville, 112 Ky. 310 17

PAGE

Weissman, et al., v. Banque de Bruxelles, 254 N. Y. 488 11
Wells Fargo Bank & Union Trust Co. v. Bank of Italy, 214 Cal. 156 24
Woodward v. Savings & Trust Co., 178 N. C. 184.... 24

STATUTES:

National Bankruptcy Act, c. 541, 30 Stat. 544, 562, Sec. 63 (U. S. C. Title 11, Sec. 103) 17

Code of Laws of the District of Columbia, Title 22:

Sec. 24 ..... 7, 19
Sec. 60 7
Sec. 78 15
Sec. 91 19

Negotiable Instruments Law of New York:

Sec. 42 ..... 7, 19
Sec. 79 7
Sec. 97 15
Sec. 111 19
Sec. 115 ..... 23, 24
Sec. 116 ..... 23, 24
Sec. 131 18
Sec. 322 18

MISCELLANEOUS:

American Law Institute—Tentative Restatement of Conflict of Laws (Proposed Final Draft No. 4, dated March 22, 1934, and Draft No. 34, dated October 16, 1930), Section 282..... 12

	PAGE
8 Corpus Juris, Sec. 608	18
Goodrich, Conflict of Laws, pp. 361, 363 and 364	14
Law of Jugo-Slavia Relating to Checks and Bills of Exchange	7
Lorenzen, The Conflict of Laws Relating to Bills and Notes, pp. 139 and 140	13
Minor, Conflict of Laws, pp. 392 and 393	14

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1934.

UNITED STATES OF AMERICA, Petitioner, against GUARANTY TRUST COMPANY OF NEW YORK, Respondent.	No. 120

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT GUARANTY TRUST COMPANY OF NEW YORK.

Statement of the Case.

This action was brought by the petitioner to recover the sum of $160 on a check drawn on the Treasurer of the United States, the amount of which was paid to the respondent upon presentment for payment, and on which the endorsement of the payee is a forgery. The District Court of the United States for the Southern District of New York gave judgment in favor of the petitioner in the amount of $259.32 (R. 15-16), its opinon (R. 14, 15) not being reported. The Circuit Court of Appeals reversed the judgment of the District Court (R. 23). The opinion of the Circuit Court of Appeals (R.

19-23) is reported in 69 Fed. (2d) 799. The petition for writ of certiorari was granted on October 8, 1934.

Statement of Facts.

The facts, which were stipulated by the parties (R. 5-13), are briefly as follows:

On or about October 29, 1921, a check was drawn by the disbursing clerk of the United States Veterans Bureau on the Treasurer of the United States in the sum of $160, to the order of Louis Macakanja, and then the check was forwarded by mail to the payee at Maja, Jugo-Slavia (R. 2). (A photostatic copy of the check appears between pages 12 and 13 of the Record.) The name of the payee appears in writing on the back of the check on the line where the payee is required to sign. His signature is presumably witnessed by two persons whose names appear thereon, and by the Mayor of the Town of Maja, whose certificate as to the payee's signature also appears on the back of the check (R. 6, 7). It has been stipulated that the endorsement of the payee is a forgery (R. 6). The purported endorsement of the payee was made in Jugo-Slavia on or about November 30, 1921, and on that date the check was transferred and delivered to the "Merkur" Bank in Jugo-Slavia for a valuable consideration (R. 6). Subsequently and about December 3, 1921, the "Merkur" Bank duly endorsed the said check and transferred and delivered it to the "Slavenska" Bank, D. D., Zagreb, in Jugo-Slavia, for a valuable consideration (R. 7). Both banks received the check in good faith and took it without notice of any forgery or other defect, and were not guilty of any fraud or negligence in the matter (R. 7).

On or about December 3, 1921, the "Slavenska" Bank, for value received, duly endorsed the check in Jugo-Slavia to the

order of the Guaranty Trust Company of New York, the respondent in this action, and on the same day forwarded the check to the respondent by mail (R. 8). The respondent received the check by mail from the "Slavenska" Bank on or about December 21, 1921, in good faith, and took it without notice of the forgery of the payee's endorsement or of any other defect, and was not guilty of any fraud or negligence in taking the same (R. 8). The respondent was a purchaser of the check for value, and not a collecting bank. The respondent, after receiving the check, endorsed the same in New York and presented it to the Federal Reserve Bank of New York, as Fiscal Agent of the United States of America, for payment (R. 8). The Treasurer of the United States, upon receipt of the check from the Federal Reserve Bank of New York, paid the same by crediting the Federal Reserve Bank of New York with the amount of the check, and that Bank in turn credited the respondent with the amount of the check some time in December, 1921 (R. 12). On April 27, 1926, the petitioner ascertained that the payee's endorsement on the check was forged, and on June 1, 1926, requested reclamation through the Federal Reserve Bank of New York from the respondent, which was refused (R. 12).

The following is the English version of what appears on the back of the aforesaid check (as stipulated by the parties) (R. 6, 7):

"Form approved by the Comptroller of the Treasury December 17, 1917.

I acknowledge the receipt of the sum of $160. (One Hundred Sixty Dollars).

Notice to the Payee

This check must be endorsed in ink or in indelible pencil on the line below by the person in whose favor

it is drawn and the name must be spelled exactly the same as it is on the face of the check.

If endorsement is made by mark [X] it must be witnessed by two persons who can write, giving their place of residence in full.

LOUIS MACKANJA

.....

(Signature)

Witnesses
George Mrdjen
Stojan Stoic

It is officially certified that the receiver of the money as well as the witnesses, well known to this municipal administration, have in their own handwriting subscribed the foregoing instrument. The holder of this check is identical with the beneficiary thereof.

THE MUNICIPAL ADMINISTRATION OF MAJA

November 30, 1921

VUJAKLIJA
Mayor

(Stamp of the Municipal
Administration of Maja)

'MERKUR'
Banking and Exchange Business
Stanko Shon
Zagreb
Pay to the order of Guaranty Trust Co.
of New York
New York City, N. Y.
Slavenska Bank D. D. Zagreb
*.....)

(Signatures of officials
of the Slavenska Bank)"

(The stamped endorsements of the defendant, Guaranty Trust Company of New York and of the Federal Reserve Bank of New York also appear on the back of the check.)

---

* Signatures illegible.

Questions Presented.

1. The primary question in this case is one of conflict of laws involving a negotiable instrument: Whether the law of Jugo-Slavia, where the check was negotiated and transferred, or the law of the District of Columbia, where the check was drawn and payable, should control in so far as the liability of the respondent, who endorsed the check in New York, is concerned.

2. A subsidiary question raised by the petitioner relates to the effect of a guaranty of prior endorsements given by the respondent with respect to the check involved herein.

The Statutes Involved.

The statutes involved and the law of the Kingdom of Jugo-Slavia in reference to checks and bills of exchange are set out in the Appendix (*post*, pp. 28-29).

SUMMARY OF ARGUMENT.

I.

Although the check was drawn and payable by the petitioner in the District of Columbia, it was intentionally sent by petitioner to the payee in Jugo-Slavia where it would undoubtedly be negotiated in order for the payee to collect the proceeds thereof. The law of the place of transfer of a negotiable instrument determines the rights acquired by the transferee thereunder. The check in question was transferred, after the payee's endorsement was forged, first to one Jugo-Slavia bank, then to another Jugo-Slavia bank, and finally to the respondent in Jugo-Slavia, so the law of that country governs. In any event, the respondent obtained the

same rights in the check which its transferor, the second Jugo-Slavian bank had therein. Under the law of Jugo-Slavia, the place of transfer, the transferees, including the respondent, obtained a good title to the instrument and *the right to collect and retain the proceeds thereof,* in spite of the fact that the endorsement of the payee was forged. The drawer-drawee's obligation is simply to pay the instrument according to its tenor.

II.

The warranty contained in the respondent's endorsement does not affect or defeat its right to retain the proceeds. A warranty or guaranty of prior endorsements merely guarantees that the prior endorsements are operative to transfer title to the instrument and to give the holder the right to collect the proceeds. It is not a warranty of the authentic penmanship of the payee. Since under American law title to the instrument does not pass, if the payee's signature is forged, the question of a warranty of prior endorsements naturally can hardly be separated from the question of title and the resulting right to receive payment. By reason of the substantive law of Jugo-Slavia, the respondent acquired a good title to the instrument and the right to collect the proceeds. The fact that the Treasury Regulations required an express guaranty of prior endorsements does not alter the situation since the Government is bound by the same rules which affect ordinary individuals so far as commercial paper is concerned.

ARGUMENT.

I.

The Law of Jugo-Slavia Controls.

A.

Preliminary Considerations.

The respondent concedes that under American law the forged endorsement of the payee of a negotiable instrument is wholly inoperative, and that no right to retain the instrument or enforce payment thereof can be acquired through the forged signature (Title 22, Sec. 24, Code of Laws—District of Columbia, *post,* p. 28); (Sec. 42—New York Negotiable Instruments Law, *post,* p. 28). The respondent concedes further that a forged endorsement of the payee under American law does not constitute a negotiation of the instrument, and naturally a transferee acquiring the instrument under such an endorsement can not be deemed a holder in due course, and is subject to the defense that he has no title to the instrument because of the forged endorsement (Title 22, Sec. 60, Code of Laws—District of Columbia); (Sec. 79—New York Negotiable Instruments Law).

The law of the Kingdom of Jugo-Slavia is set forth in the Appendix (*post,* p. 29). Under that law, the provisions of which the petitioner conceded in the stipulation of facts (R. 8), the transferee of a negotiable instrument obtains a good title to the instrument *and acquires the right to collect and retain the proceeds* thereof, even though the endorsement of the payee is forged, where there is a chain of endorsements from the payee to the transferee, and where the transferee gives valuable consideration for the instrument

and takes the same without notice of any forgery or other defect, and is not guilty of fraud or negligence.

The real issue in this suit, therefore, is whether the American law as embodied in the Negotiable Instruments Law, or the law of Jugo-Slavia, which represents the continental view, should govern in so far as the rights of the respondent are concerned.

If the American law is to apply here, then the petitioner is entitled to a reversal of the judgment below, but if the law of Jugo-Slavia is to control this situation, then the Circuit Court's judgment should be affirmed.

The Government in its brief has not seen fit to discuss this question, which is one of conflict of laws, to any extent and apparently takes the position that American law should obtain here because under that law a transferee taking under a forged endorsement gets no title, cannot enforce payment and is not holder in due course.

As stated above, the respondent does not dispute the provisions of the American Negotiable Instruments Law, but does contend that under the rules of conflict of laws, the law of Jugo-Slavia must control under the circumstances.

The Government in its brief apparently seeks to avoid the real issue. Although the Government in the first instance seems to concede the applicability of the law of Jugo-Slavia, nevertheless it refuses to give effect to the provisions of that law, and then proceeds to argue the question presented, as though it were governed exclusively by American law. It concedes that the respondent *may* have a bare legal title to the instrument by reason of the Jugo-Slavian law, and that as between transferees that law *may* apply (pp. 8, 9 and 11 of its brief), but it overlooks the fact that the Jugo-Slavian law not only provides that the transferee gets a good legal title to the instrument in spite of the forgery, *but also that the*

transferee acquires the right to collect and retain the proceeds thereof. As a result, the main issue in this case is confused, and the Government's argument proceeds on a complete misconception of the provisions of the Jugo-Slavian law.

B.

UNDER CONFLICT OF LAWS THE LAW OF THE PLACE OF TRANSFER OF A NEGOTIABLE INSTRUMENT DETERMINES THE RIGHTS ACQUIRED BY THE TRANSFEREE.

Although the authorities on this subject are not numerous, we submit that it is well settled that in determining what rights a transferee has acquired to a negotiable instrument the law of the place where the instrument was transferred should govern.

In England where the law with reference to forged endorsements is the same as in this country it has been squarely held in an analogous case that in determining a party's title and rights to a check the law of the place where the check was transferred should govern and control. This case is *Embiricos* v. *Anglo-Austrian Bank,* 1 L. R. [1905] 1 K. B. 677. There a Roumanian bank drew a check in Roumania *payable to the order of plaintiffs,* on a London bank. Plaintiffs in Roumania on the same day specially endorsed the check to A, a London firm, and wrote them a letter in which plaintiffs enclosed the check. Subsequently the check was stolen from the envelope by a clerk of the plaintiffs. Three days later the check was presented at the B bank in Vienna, Austria, by a person who desired to have it cashed. At that time it bore the endorsement of A, which was in fact a forgery, as well as the special endorsement of the plaintiffs. The B bank was ignorant of the forgery; the endorsements on the check were apparently regular and in order, and the

bank was not guilty of any negligence in cashing the check. On the same day the B bank endorsed the check to defendants and sent it by mail to defendants in London, England, where defendants cashed it at the bank on which it was drawn. The plaintiffs then brought an action to recover damages for wrongful conversion of the check on the theory that defendants had no title to the check nor right to retain the proceeds. This is really the precise point involved in the present case.

Judge Walton in the lower court held that the Austrian and not the English law would control in respect of rights which had been acquired by the defendants.

As stated before, the English law is the same as the general American law. However, under the Austrian law the bona fide holder of a check who has given value in ignorance of any flaw in the title of the transferor is entitled to the check and the proceeds thereof although the endorsements upon it have been forged.

Judgment was given for the defendants upon the ground that by the transfer in Austria the Vienna bank obtained a good title in the check, which was then transferred to the defendants, who, when they presented the check for payment, were dealing with their own property. This judgment was unanimously affirmed by the Court of Appeal.

Judge Vaughan Williams of the Court of Appeal said, at pages 683-684:

> "I think that the view taken by Walton, J., of the effect of the decision in *Alcock* v. *Smith* ([1892] 1 Ch. 238), that the rule that the validity of the transfer of chattels must be governed by the law of the country in which the transfer takes place, applies to a bill or a cheque, and applies to the transfer of bills or cheques in cases where the transfer is by indorsement, is right; although in the case of *Alcock* v. *Smith* the transfer was not by indorsement, but by process of law in the shape

of a judicial arrestment. This conclusion seems sufficient to negative the cause of action in the present case, which is an action by the payee against an indorsee, who claims under a forged indorsement giving him a good title in the country where the indorsement was made.

But it would manifestly be an unsatisfactory state of the law if the legal result is that the indorsement is effective to give the indorsee of a bill a good title as against the payee, but not effective according to English law to give that indorsee a good title against the drawer or the acceptor. And it would be convenient, as well from a legal as from a commercial point of view, that it should be established that the title by such an indorsement is good as against the original parties to a negotiable instrument, having regard to the contractual liability incurred by them thereby."

Judge Williams thus indicated clearly in his opinion that the same rule should apply against the drawer or acceptor of the instrument.

The mere fact that the instrument involved there was a foreign bill should not make any difference, particularly when we consider that here the check was deliberately sent by the petitioner to the payee in Jugo-Slavia for negotiation and transfer.

The rule enunciated in the *Embiricos* case relating to the transfer of negotiable instruments was definitely approved by the Court of Appeals of the State of New York in a unanimous decision in the case of *Weissman, et al.* v. *Banque de Bruxelles,* 254 N. Y. 488. In that case Judge Pound stated, at page 494:

"Bills and notes were developed under the law merchant as convenient instrumentalities of trade and commerce. They pass from hand to hand by indorsement and delivery, and properly are governed by the rule relating to the transfer of tangibles. *The rule of international law, that the validity of a transfer of movable chattels must be governed by the law of the country*

in which the transfer takes place, applies to the transfer of checks or bills of exchange by indorsement. Goodrich on Conflict of Laws, p. 363 et seq., and cases cited; Embiricos v. Anglo-Austrian Bank, [1905] 1 K. B. 677." (Italics ours.)

This rule has again been stated with approval by the Court of Appeals in the recent case of *Hutchison* v. *Ross,* 262 N. Y. 381, at pages 389, 390.

The American Law Institute and leading writers on the subject advocate the same rule.

See American Law Institute, Tentative Restatement, Conflict of Laws (Proposed Final Draft No. 4, dated March 22, 1934), Section 282, which states:

"§ 282. Embodiment of Right in Document.

(1) Whether a right is embodied in a document depends upon the law which created the right.

(2) The validity of the conveyance of a right embodied in a document depends upon the validity of the conveyance of the document.

(3) The validity of a conveyance of a document in which a right is embodied as stated in Subsection (1) is governed by the law of the state where the document is at the time of the conveyance."

The comments and illustrations of this and prior drafts support fully our position.

Comment (b) of the proposed final draft says that "Documents which embody rights include common law or mercantile specialties, as for instance negotiable bonds, bills, notes, and checks".

The following illustration was given under Section 282 in a prior draft (Draft No. 34, dated October 16, 1930):

"A check on a bank in state X is stolen in State Y and there negotiated. By the law of Y the indorsee gets a perfect title; by the law of X no title passes under the circumstances. The indorsee presents his check for payment to the bank on which it is drawn. It should be paid."

A further illustration is given in the proposed final draft:

> "A bond payable to bearer in state X is stolen in state Y and there negotiated. By the law of Y the purchaser gets a perfect title; by the law of X no title passes under the circumstances. The purchaser presents the bond for payment to the bank at which it is payable. It will be paid."

Professor Lorenzen of Yale University in his treatise, *The Conflict of Laws Relating to Bills and Notes*, states at page 140 that title to a negotiable instrument acquired in conformity with the law of the place of transfer should be recognized with respect to all parties to the instrument (See his discussion at pages 139 and 140*).

---

* Lorenzen, *The Conflict of Laws Relating to Bills and Notes*, pp. 139-140:

> "On the one hand it may be said that a party executing a negotiable instrument or becoming a party thereto may be reasonably charged with notice that the bill or note may be transferred in a state other than the one in which it was issued or in which it is payable and that he shall be bound, therefore, by the law of such state. The modern rule relating to the transfer of chattels may be invoked by way of analogy in favor of this view.
>
> Looking at the question from the standpoint of American law, the question would be whether a title acquired under the law of the place of transfer through a forged indorsement should be respected. Is not such a passing of title opposed so clearly to our fundamental notions of justice that giving effect thereto would be in contravention of our policy? The author is inclined to accept the view of Vaughan Williams, L.J., (referring to the *Embiricos* case) and to recognize a title acquired under the law of the place of transfer. Whether the owner of a negotiable instrument whose signature has been forged or whether the party who in good faith acquired such instrument should be protected is a question in regard to which Anglo-American law has taken one view and the continental countries another. * * * Whether one rule or the other should be chosen is merely a question of commercial policy. As no moral issues are involved the recognition of such foreign acquired title would not shock the conscience of our courts. In the opinion of the author the uniform act should provide that each party be held if the holder of the instrument has acquired title in accordance with the municipal law of the state where such party's contract was made, but that title acquired in conformity with the law of the place of transfer shall be recognized with respect to all parties" (Matter in parentheses ours).

Goodrich on *Conflict of Laws* states, at page 361:

> "The transfer of an intangible chose in action is by assignment, and is governed by the law of the place of assignment.
>
> If the chose in action has assumed the form of a commercial specialty such as a bill of exchange or promissory note, its transfer is governed by the law of the place of the document at the time of the transfer."

See his discussion on this question at pages 363-364.

See also

Minor *Conflict of Laws,* pages 392 and 393.

This Court has also applied this rule to the transfer of stock certificates in *Disconto-Gesellschaft* v. *U. S. Steel Corp.,* 267 U. S. 22, at 28-29.

See also

McClintick v. *Cummins,* 15 Fed. Cas. 1272, No. 8699;

Brook, Oliphant & Company v. *Vannest,* 58 N. J. Law 162;

Fogarty v. *Neal,* 201 Ky. 85;

Dundas, et al. v. *Bowler, et al.,* 8 Fed. Cas. 30, No. 4141.

C.

THE TRANSFER OF THE CHECK IN QUESTION TOOK PLACE IN JUGO-SLAVIA.

The petitioner has stipulated that the transfers to the "Merkur" and "Slavenska" banks occurred in Jugo-Slavia (R. 6, 7). The transfer to the respondent was also made there. It is further stipulated that the check was endorsed by the "Slavenska" Bank to the order of respondent for value,

in Jugo-Slavia, and then mailed to respondent in New York (R. 8). The placing of the check in the mails constituted, in legal effect, a delivery to respondent in Jugo-Slavia, and hence a transfer to respondent there.

See

Hayden v. *Chemical National Bank,* 84 Fed. 874; affirmed in 174 U. S. 610;

Chapman v. *Mills and Gibb,* 241 Fed. 715; affirmed 250 Fed. 1018.

Regardless of whether the transfer to the respondent be considered to have occurred in Jugo-Slavia or some other place the respondent acquired the same title and rights to the check which its transferor, the "Slavenska" Bank had at the time of transfer (Title 22, Sec. 78, Code of Laws—District of Columbia, *post,* p. 28); (Sec. 97 of New York Negotiable Instruments Law, *post.* p. 28).

D.

Under the Law of Jugo-Slavia the Respondent Acquired a Good Title to the Check, and the Right to Collect and Retain the Proceeds.

According to the conflict of laws rules announced by the courts in the cases cited, and by the textwriters mentioned under B hereof, the law of Jugo-Slavia, and not the American law, should control in determining the rights of the respondent herein, since the check was transferred in Jugo-Slavia.

Under the law of that country, the two Jugo-Slavian banks and the respondent acquired not only a good title to the check, *but also the right to collect and retain the proceeds,*

since each gave value for the instrument, took it in good faith without notice of any forgery or other defect, and was not guilty of any fraud or negligence in the matter, and the instrument purported to bear a chain of endorsements from the payee to the particular holder, transferee or endorsee involved (R. 6-8).

The application of the Jugo-Slavian law with reference to the rights acquired by the respondent, which was not a mere collecting agency, but a purchaser for value, is manifestly just and fair in this case when we consider that the petitioner sent the check by mail to the payee, Louis Macakanja, in Jugo-Slavia (R. 2). In so doing the petitioner must reasonably have anticipated that the instrument would undoubtedly be negotiated in that country in order for the payee to collect the proceeds of the check, and further that the law of that country might differ from the American law with reference to negotiable instruments. Petitioner cannot now complain, if it appears that under the law of Jugo-Slavia, where the instrument was transferred, the transferees obtained a good title thereto and the right to retain and collect the proceeds, although the endorsement of the payee was a forgery.

This is not a case where personal property has been surreptitiously removed from a jurisdiction and taken to another jurisdiction where the laws give good title to the transferee in spite of a theft. Here the petitioner deliberately sent the check to Jugo-Slavia, and thereby consented that the law of that country with reference to forged endorsements should control in determining the rights acquired by the transferees.

As stated under "A" hereof, the Government has completely overlooked that provision of the Jugo-Slavian law which gives the transferee "the right to collect and retain the proceeds" of the check, in addition to a good title to the instrument.

Inasmuch as the Government's argument proceeds chiefly upon this misconception, it seems advisable at this time to answer briefly the argument advanced on pages 9 and 10 of the Government's brief to the effect that in certain instances an individual may have legal title to an instrument purporting to be negotiable, but still have no enforceable rights against the maker thereof.

It is there stated that in some cases an intervening discharge in bankruptcy deprives the holder of an enforceable right against the drawer. *Blackwell* v. *Farmers & Mechanics National Bank,* 97 Texas 445, and Section 63 of the National Bankruptcy Act are cited for this proposition.

The *Blackwell* case does not involve a bankruptcy at all, and furthermore the plaintiff, the holder of some notes, was there permitted to recover.

Section 63 provides that a fixed liability as evidenced by an instrument in writing, such as a negotiable instrument, is provable against the bankrupt. Obviously, if the holder of an instrument neglects to file his claim within the time allowed, a discharge in bankruptcy of the drawer will cut off his rights therein. This is the same situation as when the holder of a valid negotiable instrument neglects to commence suit to collect the same prior to the running of Statute of Limitations. In these instances, the fault lies wholly with the holder himself.

The Government also cites in its brief (p. 10) some cases where the death of the drawer of a check prevents its enforceability against him by the holder. The case of *Weiand's Administrator* v. *State National Bank of Maysville,* 112 Ky. 310, merely sets forth the well established rule that the drawer of a check may at any time prior to presentation revoke it, and that the death of the drawer operates as such

revocation. In *Pullen* v. *Placer County Bank,* 138 Cal. 169, the court held that the giving of the check involved was not a completed gift under the provisions of a California statute and therefore the holder was not entitled to collect it. We submit that these cases have no possible bearing on the questions involved in the present case.

The Government then states the general proposition that where a person acquires title to an instrument after maturity, he takes the instrument subject to any defenses which the maker or drawer may have, and consequently may have no enforceable rights. *Beneficial Loan Association* v. *Hillery,* 95 N. J. L. 271, involved a promissory note acquired after maturity, and *State ex rel. Hadley* v. *Greenville Bank,* 187 S. W. (Mo.) 597, dealt with certificates of deposit, all payable several months after date, and taken after maturity. These cases can have no application to the instant one. A check is not considered overdue so as to render the holder subject to defenses which the drawer may have against a prior holder unless there has been an unreasonable delay in presenting it. (*Bull* v. *Bank of Kasson,* 123 U. S. 105, *8 Corpus Juris,* Sec. 608, New York Negotiable Instruments Law, Sec. 131 and Sec. 322.) The contention has never been made that the check involved here was overdue at the time the respondent acquired it, or that it was not presented for payment within a reasonable time, and under the circumstances surrounding the issuance, negotiation and presentment of the check no such contention could be made.

We submit that the argument made by the petitioner that the respondent, although it may have title, stands in no better position than the holders of the negotiable paper in the cases cited by the petitioner, has no merit since, as we pointed out above, these cases present situations which have

not the slightest analogy to the one with which we are here concerned.

The Government argues that the respondent is seeking to enlarge the obligation of the petitioner, the drawer-drawee of the check. This is not so. We are not urging any obligation on the part of the defendant other than that it pay the instrument according to its tenor (Title 22—Sec. 91—Code of Laws—District of Columbia, *post,* p. 28); (Sec. 111—New York Negotiable Instruments Law, *post,* p. 29). This obligation, we respectfully submit, the petitioner cannot escape because, under the law of Jugo-Slavia, where the transfers took place, the respondent in spite of the forged endorsement of the payee, acquired good title to the instrument and the right to collect the proceeds thereof.

II.

The warranty contained in the respondent's endorsement does not affect or defeat its right to retain the proceeds.

In order to understand clearly the meaning of a warranty or guaranty of prior endorsements it is necessary to consider briefly the effect of a forged endorsement and the theory of an action of this type.

Under the American law, as stated *supra,* where the endorsement of the payee of a check is forged, a subsequent holder gets no title to the same and has no right to enforce payment (Section 42—New York Negotiable Instruments Law, *post,* p. 28); (Title 22, Section 24; Code of Laws—District of Columbia, *post,* p. 28).

See also

Seaboard National Bank v. *The Bank of America*, 193 N. Y. 26, at 30, 31;

Geering v. *Metropolitan Bank*, 170 N. Y. App. Div. 751, at 752, aff'd 225 N. Y. 711.

Accordingly, the theory of an action of this kind is that money has been paid under a mistake of fact and in reliance upon a representation or warranty that the party presenting the instrument has good title to the same and the right to collect the proceeds. Since the presenting party has no such title or right by reason of the forged endorsement under American law, there has been no consideration for the payment, and the money remains, in equity and good conscience, the property of the payer, and may be recovered back by him, as money had and received to his use. *Leather Manufacturers' Bank* v. *Merchants' Bank*, 128 U. S. 26, at 34, 35.

The petitioner's complaint shows that this action was brought on this theory. Paragraph Ninth of the complaint alleges the forgery and then goes on to state that "defendant had no right, title or interest of, in or to said check, or to the possession thereof, and no right or authority to collect the same" (R. 3).

As the respondent obtained a valid legal title to the check and the right to collect the proceeds under the law of Jugo-Slavia, then the money represented by the check was properly paid to it, and it should be permitted to retain the proceeds.

The respondent has always contended and urges here that a warranty or guaranty of the genuineness of prior endorsements is nothing more than a guaranty that the prior endorsements are operative to transfer title to the instrument and consequently give the holder the right to enforce payment thereof. The courts under the common law and the

Negotiable Instruments Law invariably couple a warranty or guaranty of prior endorsements with the question of the passing of title and the rights incident thereto. It is clear from the opinions of the courts that the significant element is the passage of title of the instrument, including the right to collect the proceeds, rather than the authenticity of the penmanship of the endorsements.

See

Leather Manufacturer's Bank v. *Merchants' Bank, supra;*

United States v. *National Exchange Bank,* 214 U. S. 302, at 316;

Insurance Co. of North America v. *Fourth National Bank* (Dist. Ct. N. D., Georgia), 12 Fed. (2d) 100, at 101;

Central National Bank v. *North River Bank,* 44 Hun (N. Y.) 114, at 115;

Lennon v. *Grauer,* 159 N. Y. 433, at 435.

Naturally, under American law the question of a warranty of prior endorsements can hardly be separated from the question of title and the right to enforce payment, since under that law, if the payee's signature is forged, title does not pass and there is no right to collect the proceeds. It is therefore almost impossible to conceive of a case under American law where, upon transfers made solely in this country, a holder might have title, and yet the payee's signature might be forged.

The whole purpose of negotiable instruments in the commercial world is to provide a system by which money can be paid to the party who acquires good title to the instrument. All the machinery regulating transfers and endorsements of negotiable instruments is concerned solely with the

transfer of title and the rights incident to such title. To whom would the proceeds of a check be paid if not to the legal owner thereof?

We submit that the warranty of an endorsement does not warrant the handwriting or the authentic penmanship of the payee but merely that the endorsement by whomever written was sufficient to pass title to the instrument and the right to enforce the same. This can be tested in the following instances. If the signature is written by an authorized agent of the payee, the penmanship is not that of the payee but of the agent, and yet the warranty of endorsement is not broken since title passes to the subsequent holder by reason of the agent's having been authorized to sign the payee's name. The same thing would be true where the signature of the payee was originally unauthorized, but subsequently ratified. By reason of the substantive law in Jugo-Slavia, where the transfers of the check involved here occurred, the same result follows as in the case of an endorsement by an authorized agent, or where there has been subsequent ratification of an unauthorized signature, in the United States, namely, the acquisition by the respondent of a good title to the check and the right to collect the proceeds.

The full reasoning of the Circuit Court of Appeals on this point is as follows (R. 22-23):

> "The action of the defendant in stamping the statement 'Previous endorsements guaranteed' on the check before presenting it for payment is urged as a basis of recovery. Ordinarily such a warranty means that the indorser warrants that previous indorsements are genuine and payment made in reliance upon the warranty may be recovered upon proof that such an indorsement is not. Onondaga County Savings Bank v. U. S. (C. C. A. 2), 64 F. 703; United States v. National Exchange Bank, 214 U. S. 302, 29 S. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184; Farmers' State Bank v. United States

(C. C. A.), 62 F. (2d) 178. But this is so when previous indorsements must be genuine to give a good title to the one who guarantees them. The guaranty is one of the title rather than of authentic penmanship or its equivalent. When, as here, the indorsements are of the same sufficiency in law that they would be if all were genuine, the warranty is in accord with the legal situation, and there is no breach."

In other words, the Circuit Court of Appeals below held that the payee's endorsement, by virtue of the Jugo-Slavian law, is of the same efficacy in law as it would be if genuine, and that therefore the warranty here represents the true legal situation. A warranty of signature, separate and apart from a warranty of title, would have no meaning and no consequences. The controlling factor is title, with the resultant right to collect the proceeds.

The Government contends at page 13 of its brief that the holding of the Circuit Court to the effect that the guaranty of prior endorsements is one of title rather than of "authentic penmanship" renders subsections (1) and (3) of Sections 115 and 116 of the New York Negotiable Instruments Law mere verbiage.

This, we submit, is not true. The warranty of subsection (1) of each section is merely that the instrument is genuine and in all respects what it purports to be. The check involved in this action was genuine and was actually what it purported to be, namely, a United States Government check duly issued by the Disbursing Clerk of the United States Veterans' Bureau. The warranty provided in subsection (1) has nothing to do with the warranty that the chain of title is good. That is a separate and distinct matter and is the occasion for subsection (2) of each section. Endorsements naturally come under this subsection since under American law, if endorsements are forged, there is no passage of title.

If the Government's contention is given effect, then subsection (2) would be merely surplusage because the warranty provided in subsection (1) would cover everything. Subsection (3) of each section is not in any way affected by the decision below since no contention has been raised that any of the prior parties were laboring under any disability, such as infancy or the like, and therefore did not have capacity to contract.

In the instant case, since the petitioner is the drawee of the check involved, these Sections 115 and 116 have no application anyway, because the warranties provided in the sections only run "to all subsequent holders in due course", and a drawee is not considered a holder in due course.

In New York and other states where the Uniform Negotiable Instruments Law has been adopted, a drawee is not regarded as a holder in due course.

Dousmanis v. *Colonial Bank,* 134 Misc. (N. Y.) 472, at 473;

American Hominy Co. v. *Millikin National Bank* (Dist. Ct. S. D. Illinois), 273 Fed. 550, at 555;

National Bank of Commerce v. *Seattle National Bank,* 109 Wash. 312, at 321, 322;

Woodward v. *Savings & Trust Co.,* 178 N. C. 184, at 189;

Wells Fargo Bank & Union Trust Co. v. *Bank of Italy,* 214 Cal. 156, at 164.

Under the decisions of this Court and the New York courts, a warranty of prior endorsements is implied in law whenever a party endorses an instrument and presents it to the drawee for payment. An implied warranty of prior endorsements is nothing more than an implied warranty of valid title. Good title, with the resulting right to collect the

proceeds, not the genuineness of the signatures, is the essence of the warranty. This was the rule at common law and still applies in so far as the relationship of drawee and endorser is concerned.

See

Leather Manufacturer's Bank v. *The Merchants' Bank, supra,* at 34-35;

United States v. *National Exchange Bank, supra,* at 316, 319 and 320;

Central National Bank v. *North River Bank, supra,* at 115;

New York Produce Exchange Bank v. *Twelfth Ward Bank,* 135 N. Y. App. Div. 52, at 53.

The petitioner also argues that it should recover in this action since the Treasury Regulations required an express guaranty of prior endorsements as a condition precedent to the payment. Even if the respondent had not given an express warranty or guaranty, when it endorsed the check, such a warranty would have arisen by operation of law, and we respectfully submit that an express warranty of prior endorsements has no greater effect than one implied in law. In any event, the warranty or guaranty of prior endorsements, whether express or implied, means only that the prior endorsements were effective to give a valid title to the holder and the right to enforce payment thereof, as stated *supra.*

The United States Government by a regulation cannot change the law in this respect or enlarge the obligations or liabilities of the respondent, as an endorser of the check, since the Government is bound by the same rules which affect ordinary individuals in so far as commercial paper is concerned. When the Government becomes a party to commercial paper, it incurs all the responsibilities of a private person under the same circumstances.

See

Cooke v. *United States,* 91 U. S. 389, at 396;
United States v. *National Exchange Bank,* 270 U. S. 527, at 534;
United States v. *Bank of New York,* (C. C. A. 2) 219 Fed. 648, at 653;
Ladd & Tilton Bank v. *United States* (C. C. A. 9) 30 Fed. (2d) 334, at 336.

If the respondent had merely endorsed the check and had refused to give an express guaranty as required by the Treasury Regulations, the petitioner could not have legally refused to make payment, because its status would be the same as that of any individual drawee or drawer. A letter referring to these same Treasury Regulations, which was sent to the respondent by the Under-Secretary of the Treasury about the time this check was paid (R. 11-12), clearly indicates that the Government did not intend by these Regulatons to increase the obligations of an endorser or to change in any way its own responsibilities as a party to commercial paper, or to make its status any different from that of the private indivdual.

We submit that the fact that the Government yearly issues great numbers of checks should not entitle it to any more consideration than a private concern which draws only a few checks, or which issues as many or more checks. See *United States* v. *National Exchange Bank, supra,* at 534. If the Government sends checks to a foreign country it must assume the risk that the law of that country may differ from the American law, and there would seem to be no reason why possible losses arising out of forgeries committed abroad should be heaped upon American banks who purchase or act as collecting agents for the paper. Banks in this country might very properly refuse to purchase or collect

Government paper negotiated abroad, if the Government is not to be bound by the law of the country of negotiation, in cases where the banks have no possible means of ascertaining the genuineness of the payee's endorsement.

In connection with this point the petitioner suggests the question of double liability on the part of the Government. As far as this case is concerned no mention has been made of any possible double liability, and we submit that it would be quite as fair to suggest that if the petitioner were to succeed in this case, it would do so to its clear profit.

In this connection we wish to make the point that a warranty or guaranty of prior endorsements is in no sense a warranty that the Government may not be subjected to other demands by the same or a different party or to additional liability apart from the negotiable instrument involved. It is by no means a general contract of indemnity. The point, we respectfully submit, merely emphasizes our contention that a warranty of prior endorsements, limited as it necessarily is to the negotiable instrument in question, cannot be anything other than a warranty of title to that particular instrument, and the resulting right to enforce the payment thereof.

CONCLUSION.

In accordance with the foregoing, it is respectfully submitted that the judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed.

Dated, New York, N. Y., October 30, 1934.

Respectfully submitted,

JOHN W. DAVIS,
THEODORE KIENDL,
Counsel for Respondent.

APPENDIX.

Statutes.

Title 22, Sections 24, 78 and 91 of the Code of Laws of the District of Columbia provides as follows:

> § 24. Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.
>
> § 78. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.
>
> § 91. The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

Section 42 of the New York Negotiable Instruments Law is identical to Section 24 of the Code of Laws of the District of Columbia, set forth above.

Section 97 of the New York Negotiable Instruments Law is identical to Section 78 of the Code of Laws of the District of Columbia, set forth above.

Section 111 of the New York Negotiable Instruments Law is identical to Section 91 of the Code of Laws of the District of Columbia, set forth above.

The law of the Kingdom of Jugo-Slavia in 1921 and at the present time, with reference to checks and bills of exchange, is as follows (R. 8):

> "Upon the negotiation and transfer of a check or bill of exchange each transferee, endorsee or holder thereof obtains a good title to the instrument and acquires the right to collect and retain the proceeds thereof, even though the endorsement of the payee is forged where
>
> (a) the instrument purports to bear a chain or series of endorsements from the payee of the instrument to the transferee, holder or endorsee thereof; and
>
> (b) the said transferee, holder or endorsee gives valuable consideration for the instrument; and
>
> (c) the said transferee, holder or endorsee takes the instrument without actual notice of any forgery or other defect in the instrument and is not guilty of any fraud or gross negligence in taking the instrument."

The law of Jugo-Slavia further provides that

> "(a) when an endorsement follows a blank endorsement there is a presumption of law that the person who executed the endorsement has acquired title to the instrument under the blank endorsement; and
>
> (b) the transferee, holder or endorsee of the instrument is under no duty or obligation to investigate the genuineness of prior endorsements."